Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JANE E. BENTLEY, PETITIONER

v.

ATLANTIC COUNTY, NEW JERSEY; THE OFFICE OF THE SHERIFF OF ATLANTIC COUNTY, NEW JERSEY; JAMES MCGETTIGAN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF OF ATLANTIC COUNTY; JOSEPH CONNELY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DAVID S. DESSEN
Counsel of Record

Dessen, Moses & Rossitto
600 Easton Road
Willow Grove, PA 19090
ddessen@dms-lawyer.com
(215) 658-1400

CURRY & TAYLOR • 202-393-4141

QUESTIONS PRESENTED

A. Following a public employer's failure to offer a pretermination opportunity to be heard, may the District Court, without conducting an evidentiary hearing, remove from the jury's consideration the question of whether a post-termination proceeding instituted by the plaintiff satisfies procedural due process in a § 1983 action seeking economic compensatory damages and damages for emotional distress?

B. Is a § 1983 plaintiff seeking money damages for emotional distress suffered as a result of a violation of the constitutional right to procedural due process required to prove that she suffered "severe" emotional distress?

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The order of the United States Court of Appeals for the Third Circuit denying *en banc* rehearing entered on August 25, 2010 is not officially reported and is reproduced at App. 32a – 33a. The order of the United States Court of Appeals for the Third Circuit affirming the District Court judgment entered on May 27, 2010 is not officially reported and is reproduced at App. 1a – 5a.

The decision and order of the United States District Court for the District of New Jersey denying Defendants' second Motion for Summary Judgment as to Count I of the complaint dated March 6, 2008 is not officially reported and is reproduced at App. 19a – 31a. The District Court's decision and order precluding Plaintiff from seeking compensatory economic damages dated August 18, 2008 is not officially reported and is reproduced at App. 7a – 18a.

JURISDICTION

The order of the United States Court of Appeals for the Third Circuit denying *en banc* rehearing was entered on August 25, 2010. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within ninety (90) days of the order denying *en banc* rehearing. This Court has jurisdiction to review the order of the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1254.

RELEVANT PROVISIONS INVOLVED

Section 1 of the *Fourteenth Amendment* to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 states:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia

shall be considered to be a statute of the District of Columbia.

STATEMENT

The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331, 1343 and 1367.

A. Background

Petitioner Jane E. Bentley (hereinafter referred to as "Bentley"), an African American female hired as a Sheriff's Officer by the Atlantic County, New Jersey Sheriff on December 7, 1981, spent her career assigned to the Atlantic City Civil Courthouse. On November 5, 2003, Respondent Joseph Connelly (hereinafter referred to as "Col. Connelly") met with Bentley and ordered her to submit a written report to him about an incident on October 28, 2003 in which Bentley was alleged to have made improper comments in the presence of a juvenile. Upon receipt of her report later that day, and without affording Bentley an opportunity to answer any questions about her report, Col. Connelly immediately suspended Bentley from duty allegedly because he believed the report to be so bizarre as to call into question Bentley's psychological fitness to perform her duties. The next day, Respondent Sheriff James McGettigan (hereinafter referred to as "Sheriff McGettigan") ratified the suspension and ordered Bentley to undergo a psychological fitness for duty examination. Because he contended that Bentley's suspension was non-disciplinary, Sheriff McGettigan never provided Bentley with written notice of the rules and regulations he alleged she violated, the evidence he

contended proved the alleged violations or an opportunity to contest her suspension.

Bentley filed a grievance on November 13, 2003, seeking arbitration on her claim that her suspension and the order that she undergo a psychological fitness for duty examination violated Article XXII of the collective bargaining agreement between Atlantic County and P.B.A. Local #243. On July 1, 2004, Respondent Atlantic County filed with the New Jersey Public Employment Relations Commission (hereinafter referred to as "PERC") a petition seeking to restrain the grievance arbitration. On October 28, 2004, PERC held that a suspension of more than five (5) days and an order to undergo a psychological fitness for duty examination could not be resolved by binding arbitration, but instead, had to be submitted to the New Jersey Department of Personnel Merit System Board (hereinafter referred to as "Merit System Board").[1]

On November 12, 2004, Bentley appealed the order that she undergo a psychological fitness for duty examination and a "de facto indefinite suspension of greater than five days" to the Merit System Board. On July 28, 2005, after receiving written legal arguments from the parties, but without holding any hearing, the Merit System Board concluded that Sheriff McGettigan's decision to suspend Bentley and order her to undergo a psychological fitness for duty examination was not disciplinary. Bentley remained suspended

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[1] On June 30, 2008, the Department of Personnel and the Merit System Board were abolished and replaced by the New Jersey Civil Service Commission. *See* Pub. L. 2008, c.29.

without pay until February 2008 when she turned 65 and pursuant to New Jersey law, was forced to retire.

B. The Litigation

On or about June 9, 2005, Bentley filed a five-count complaint against Respondents Atlantic County, New Jersey, Sheriff McGettigan and Col. Connelly. The complaint alleged in Count I that Bentley was deprived of her property without due process of law because she was not provided with an opportunity to challenge her immediate suspension from duty on November 5, 2003. Count II alleged that because she is an African American female, Bentley was treated differently than white Sheriff's Officers in that she had been suspended without pay and denied the opportunity to challenge her suspension in violation of 42 U.S.C. § 1981. Count III of Bentley's complaint alleged that because of her race and gender and in violation of 42 U.S.C. § 1983, the Defendants treated Bentley differently than white Sheriff's Officers in the investigation of complaints of alleged infractions of the rules and regulations of the Sheriff's Office and the imposition of sanctions. Count IV alleged a claim under the New Jersey Law Against Discrimination, N.J.S.A. §§ 10:5-1, *et seq.*, based upon the same facts giving rise to Bentley's Federal claims. Count V alleged that the Respondents' conduct violated the New Jersey Civil Rights Act, N.J.S.A. §§ 10:6-1, *et seq.*, in that it deprived Bentley of her right to the equal protection of the law and the privileges and immunities guaranteed by the Constitutions of the United States and the State of New Jersey.

On January 26, 2007, the Respondents filed their first Motion for Summary Judgment, seeking dismissal of Counts I, II and IV of the complaint. In an Opinion and Order dated August 16, 2007, the District Court granted the Respondents' Motion. Bentley filed a Motion for Reconsideration on August 24, 2007, which the District Court granted on January 4, 2008 as to the procedural due process claim set forth in Count I of the complaint.

On February 3, 2008, the Respondents filed a second Motion for Summary Judgment as to Bentley's due process claim and sought leave to file a late Motion for Summary Judgment as to Counts II and V of the complaint. On March 6, 2008, the District Court denied the Respondents' second Motion for Summary Judgment as to Count I, finding as a matter of law that the Respondents had violated Bentley's right to procedural due process. In a second ruling, the District Court granted the Respondents leave to file a late Motion for Summary Judgment as to Counts II and V and, based upon its prior holding as to Counts III and IV, dismissed Counts II and V.

At a conference on May 30, 2008, the District Court ordered the parties to submit trial briefs on the question of what damages Bentley would be permitted to seek at the upcoming trial. In an Opinion dated August 18, 2008, the District Court ruled that because Sheriff McGettigan's decision to suspend Bentley was ultimately upheld by the Merit System Board, Bentley could recover damages only for emotional distress suffered between November 5, 2003 and July 28, 2005, the delay occasioned by Sheriff McGettigan's failure to provide Bentley with notice that she had a right to

appeal her allegedly non-disciplinary suspension to the Merit System Board.[2] At a pretrial conference on September 12, 2008, the District Court adopted the Respondents' position that recovery of emotional distress damages was possible only if Bentley proved that the denial of due process caused her "severe" emotional distress.

The first trial in this matter began on November 12, 2008. On November 14, 2008, the jury returned with a verdict in Bentley's favor on her emotional distress claim in the amount of $92,000.00. The Respondents filed a renewed Motion for Judgment as a Matter of Law and for a New Trial. In an Opinion and Order dated March 3, 2009, the District Court granted the Respondents' Motion for a New Trial, concluding the jury had been confused about the issues to be decided.

Prior to the start of the second trial, the Respondents filed a Motion *in Limine* in which they sought the opportunity to prove the date that they allegedly notified Bentley's attorney in the grievance proceeding that the Sheriff considered Bentley's suspension to be non-disciplinary, on the theory that such date ended any delay occasioned by the Sheriff's due process violation. The District Court adopted the Respondents' position and ruled that the jury should first decide the date Bentley's grievance attorney

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[2] Although the District Court held that Bentley could seek emotional distress damages as a result of the delay, it precluded Bentley from seeking damages for any economic loss she suffered, including lost wages and pension benefits.

learned the Sheriff characterized the suspension as non-disciplinary.

The second trial began on June 22, 2009. On June 23, 2009, the jury found that Bentley's grievance attorney had learned that the Sheriff considered the suspension non-disciplinary some time between November 13, 2003 and January 2004. Bentley thereafter conceded she could not prove that she suffered "severe" emotional distress during that period and on June 25, 2009, the District Court entered judgment in her favor in the amount of $1.00.[3]

REASONS FOR GRANTING THE PETITION

This Court has held that "[P]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). "... [A] purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." *Id.* at 262. Procedural due process requires, in most cases, that a public employer afford an employee a pretermination hearing before taking an adverse employment action. "[T]he pretermination 'hearing,' though necessary, need not be elaborate... In general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). "[T]he essential

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[3] App 6a.

requirements of due process ... are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." (internal citations omitted) *Id.* Post-termination, an employee is entitled to a prompt hearing in which she can present more extensive evidence that may include relevant documents and the testimony of witnesses.

A person who is deprived of "rights, privileges, or immunities" secured by the Constitution may bring an action for damages pursuant to 42 U.S.C. § 1983, a statute that "[creates] a species of tort liability" in favor of such person. *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). In *Wood v. Strickland*, 420 U.S. 308, 319 (1975), the Court stated that damages are available under § 1983 for actions "found... to have been violative of... constitutional rights and to have caused compensable injury...." A person who suffers an actual injury from the denial of procedural due process may recover compensatory damages for the harm caused by the due process violation, damages for mental and emotional distress arising from the due process violation and, because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, one denied procedural due process may obtain nominal damages without proof of actual injury. *Carey*, 435 U.S. at 266.

While making clear that a plaintiff seeking damages for emotional distress arising from a due process violation must prove an actual injury, the *Carey* Court left open the question of what quantum of proof the plaintiff must produce to establish the injury.[4] In the more than thirty (30) years since this Court announced its decision in *Carey*, the Courts of Appeals have been unable to reach a consensus as to what a plaintiff must prove. In addition, the Courts of Appeals have been unable to agree on what damages, if any, a plaintiff is entitled to if an employer fires an employee without complying with the requirements of due process but thereafter provides a hearing that comports with due process.

The framers of the Constitution recognized that for the democracy they were creating to succeed, citizens would have to believe that they could contest actions proposed or taken by the government before an impartial court that had the power and authority to provide a remedy. The Due Process clause of the *Fifth Amendment* to the Constitution is proof of the framers' belief that the new democracy would succeed only if citizens could rely on the courts to protect them from arbitrary government action seeking to take their life, liberty or property.

The instant petition, unlike many others presented to this Court, does not raise the question of

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[4] The Court observed that, "in the case at bar, there is no proof of individualized injury to [respondents], such as mental distress...." With the case in this posture, there is no occasion to consider the quantum of proof required to support a particular damages award where actual injury is proved. *Carey*, 435 U.S. at 267 n.25.

whether Petitioner was afforded due process. It is conceded she was not.[5] Instead, this petition raises the important question of how the damages caused by that constitutional violation should be determined. In protecting a citizen's constitutional rights, it is not enough to say to the government, "You cannot do that." The law must provide a process to fully and fairly compensate the citizen for the injury caused. Because such violations are always the result of intentional conduct as opposed to negligent action, the law must also provide a process to deter similar action in the future. In affirming a series of rulings by the District Court that precluded Bentley from offering evidence to prove she suffered an actual injury, the Court of Appeals did neither. Instead, the Court of Appeals approved of the District Court's concerted effort to eliminate an award of anything but nominal damages by denying Bentley the opportunity to prove the economic and emotional harm she suffered from the undisputed violation of her constitutional right to procedural due process. This Court should not permit the damage inflicted by the violation of a citizen's constitutional rights to be so easily brushed aside.

As relevant to this petition, Bentley presented three issues to the Court of Appeals: whether the proceeding instituted by Bentley before the Merit System Board on November 12, 2004 relieved the Sheriff of his burden to prove that Bentley would still have been suspended had she been given an opportunity to explain her position; whether the Merit System Board decision foreclosed Bentley from offering evidence as to her economic loss as a result of the due

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[5] *See* the District Court's March 6, 2008 opinion at App 24a – 25a.

process violation, and whether Bentley had to prove she suffered "severe" emotional distress as a result of the due process violation.

A. The Holding of the Court of Appeals That a District Court May Find Facts That Deny a § 1983 Plaintiff the Opportunity to Prove Economic Compensatory Damages Conflicts with This Court's Holding in *Carey* and the Holdings of the Courts of Appeals for the Second, Fifth and Eighth Circuits.

The Court of Appeals' answer to the first two questions conflicts with the holdings of this Court in *Carey* and the Court of Appeals for the Second Circuit in *Stein v. The Bd. of the City of New York*, 792 F.2d 13 (2d Cir. 1986), the Court of Appeals for the Eighth Circuit in *Brewer v. Chauvin*, 938 F.2d 860 (8th Cir. 1991) and the Court of Appeals for the Fifth Circuit in *Hill v. Pontotoc*, 993 F.2d 422 (5th Cir. 1993). The Court of Appeals' resolution of the third question directly conflicts with that Court's earlier holding in *Bolden v. Se. Pa. Transp. Auth.*, 21 F.3d 29 (3d Cir. 1994) and imposes a requirement not found in this Court's jurisprudence or required by any other Court of Appeals.

In *Carey*, this Court agreed with the holding of the Court of Appeals for the Seventh Circuit, "[t]hat if petitioners can prove on remand that '[respondents] would have been suspended even if a proper hearing had been held,' then respondents will not be entitled to recover damages to compensate them for injuries caused by the suspensions." (internal citation omitted)

Carey, 435 U.S. at 260.[6] Not raised or answered by *Carey* are the questions of whether the issue of whether "[respondents] would have been suspended even if a proper hearing had been held" is a question of fact for the jury or a question of law for the court and whether a plaintiff is entitled to damages for an initial deprivation if he or she was later afforded a hearing that comported with due process.

The Courts of Appeals that have considered these questions, with the exception of the Third Circuit in the instant case, have held that the question of whether an employee would have been terminated or suspended if afforded a hearing that comported with the requirements of procedural due process is to be resolved by the factfinder, not by the court. In *Stein*, the Second Circuit held that the District Court "[s]hould have instructed the jury to award only nominal damages if it found Stein would have been discharged by ACJ even if he had received adequate notice of his disqualification proceeding from the state."

In *Brewer*, the plaintiff sought damages as the result of being fired from his job as a Deputy Sheriff in violation of his right to procedural due process. The District Court, following a bench trial, awarded plaintiff

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[6] A majority of the Courts of Appeals that have considered the question impose on the governmental entity the burden of proving that a proper hearing would not have changed the result. *See Alexander v. Polk*, 750 F.2d 250, 263-64 (3d Cir. 1984), *Wheeler v. Mental Health & Mental Retardation Auth.*, 752 F.2d 1063, 1071-72 (5th Cir. 1985) and *Franklin v. Aycock*, 795 F.2d 1253, 1263-64 (6th Cir. 1986). *But see McCann v. Coughlin*, 698 F.2d 112, 126-27 (2d Cir. 1983), in which the court held the burden to be on the plaintiff.

back pay without making any finding as to whether the termination was the result of the due process violation. The Eighth Circuit reversed because there was no finding of causation. The Court held, "[T]he finding on this issue of causation is to be made by the trial court after an appropriate evidentiary hearing into the merits of the decision to fire the plaintiff. There is no need or justification for the trial court to order that a hearing be conducted by the public officials who failed to hold such a hearing in the first place." *Brewer*, 938 F.2d at 864 n.5. *See also Hill v. Pontotoc*, 993 F.2d at 425.

There is less unanimity among the Courts of Appeals on whether damages may be recovered when an initial procedurally deficient proceeding is followed by a proceeding that comports with due process. The resolution of this question is central to a determination of what damages a plaintiff may recover where there is a second hearing. In *Patterson v. Portch*, 853 F.2d 1399 (7th Cir. 1988), the Court held that where a subsequent proceeding would have resulted in the employee's dismissal, "[A]ll Patterson lost as a result of the constitutional violation was his salary between the day that Fort terminated him and the day on which his dismissal would have taken effect had Fort followed the prescribed procedures... plus the monetary equivalent of any 'mental and emotional distress actually . . . caused by the denial of procedural due process itself,'... minus so much of the loss as might have been averted by reasonable efforts to mitigate damages." *Id.*[7]

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[7] There is conflicting authority in the Fifth Circuit as to whether a plaintiff may recover back pay for the period between the first nonconforming proceeding and a second hearing that comports with due process. In *Laje v. R.E. Thompson Gen. Hosp.*, 665 F.2d

The Third Circuit, in affirming the rulings of the District Court in the instant case, adopted an entirely different standard than that set forth by this Court in *Carey* and followed by other Courts of Appeals.[8] Instead of holding that because Bentley was never afforded an opportunity to tell her side of the story it was Sheriff McGettigan's burden to prove to the jury that Bentley would have been suspended even if afforded a proper hearing, the Court of Appeals adopted the District Court's holding that the proceeding initiated by Bentley before the Merit System Board was procedurally correct and that the Merit System Board's holding conclusively established that Bentley would have been suspended if afforded a hearing.[9]

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724 (5th Cir. 1982), the court denied recovery but permitted recovery on similar facts in *Wheeler v. Mental Health & Mental Retardation Auth.*, 752 F.2d. at 1070.

[8] Sheriff McGettigan reiterated on a number of occasions during the course of the litigation that because he considered Bentley's suspension non-disciplinary, he believed he was not required to and would not have provided Bentley an opportunity to contest her suspension.

[9] Before reaching these conclusions, the District Court conducted no hearing concerning the proceedings before the Merit System Board. The Merit System Board, in deciding Bentley's appeal, conducted no hearings and took no testimony, but made its decision on legal arguments submitted by Bentley and Atlantic County. Bentley never had an opportunity to testify concerning the events leading up to her suspension. During discovery in the instant matter, Lt Caldwell, who was present at the November 5 meeting, testified that Col Connelly told him [Caldwell] prior to Bentley presenting her report, that he [Col. Connelly] intended to suspend Bentley and that Lt. Caldwell should be prepared to take Bentley's official identification and weapon. Had Bentley been

In *Patsy v. Bd. of Regents*, 457 U.S. 496, 516 (1982), this Court held "[t]hat exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." The elective administrative remedy Bentley sought from the Merit System Board is not the equivalent of the hearing due process required the Sheriff provide. The Court of Appeals' decision, that it was proper for the District Court to hold as a matter of law that the Merit System Board holding, arrived at without any hearing, conclusively established that Sheriff McGettigan could prove that the result would be the same even if Bentley had been given an opportunity to challenge her suspension, conflicts with this Court's holding in *Carey* and the holdings of the other Courts of Appeals to consider the issue. The result of this radical and unconstitutional substitution of the court for the jury as factfinder eliminated Bentley's ability to offer proof on her claim for compensatory economic damages in this § 1983 procedural due process action.

This Court should grant this petition to resolve the conflict between the holding of the Third Circuit that the District Court may, as a matter of law, determine whether a proceeding comports with the requirements of procedural due process, and the holdings of the Courts of Appeals for the Second, Fifth and Eighth Circuits that the answer to that question is properly determined by the jury. Intertwined and inescapably linked to this issue is the related and equally important question of whether or to what extent a plaintiff may recover economic damages if the

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afforded a hearing, this clearly relevant and important information would have been presented to the Merit System Board.

jury determines that the action taken by the public employer after a procedurally correct hearing was or would have been the same.

B. The Holding of the Court of Appeals That Petitioner Could Not Recover Damages for Emotional Distress Unless She Proved "Severe" Emotional Distress Conflicts with This Court's Holding in *Carey* and the Holdings of the Courts of Appeals.

In *Carey*, this Court defined emotional distress as "mental suffering or emotional anguish." *Carey*, 435 U.S at 264 n. 20. In the same footnote, the Court, *citing Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), acknowledged that "[A]lthough essentially subjective, genuine injury in this respect may be evidenced by one's conduct and observed by others. Juries must be guided by appropriate instructions, and an award of damages must be supported by competent evidence concerning the injury." *Id.*

In *Price v. Holland*, 93 F.3d 1241 (4th Cir. 1996), the Court of Appeals undertook what the Fifth Circuit has described as "a magnum opus on the evidence needed to support compensatory damages for emotional distress." *Brady v. Fort Bend County*, 145 F.3d 691, 718 (5th Cir. 1998). The *Price* Court began its analysis by noting that common law courts have traditionally been reticent in awarding compensatory damages for emotional distress in the absence of physical injury because emotional distress is fraught with vagueness and speculation, and it is easily susceptible to fictitious and trivial claims. *Price*, 93 F.3d at 1250.

Empathizing with the trepidation of common law courts in analyzing such claims, the federal courts have recognized that emotional distress claims arising from constitutional violations are not immunized from the nebulous, speculative character that plagues their common law analogues. *Id.* However, the Fourth Circuit concluded that a survey of the case law revealed that a plaintiff's testimony, standing alone, may support a claim of emotional distress precipitated by a constitutional violation.[10] *Id.* at 1251. The *Price* Court ultimately concluded that while a plaintiff's testimony standing alone may support an award of compensatory damages, evidence of the emotional distress must be demonstrable, genuine, and adequately explained. *Id.* at 1254.[11]

In *Bolden v. Se. Pa. Transp. Auth.*, 21 F.3d 29 (3d Cir. 1994), the jury credited the plaintiff's testimony concerning the emotional distress he suffered and

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10 See e.g., *Biggs v. Village of Dupo*, 892 F.2d 1298, 1304 (7th Cir. 1990); *Spence v. Board of Educ. of Christina Sch. Dist.*, 806 F.2d 1198, 1201 (3d Cir. 1986); *Chalmers v. City of Los Angeles*, 762 F.2d 753, 761 (9th Cir. 1985); *Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267, 1272-73 (8th Cir. 1981).

11 But see *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1040 (9th Cir. 2003), where the Ninth Circuit held that "[W]hile objective evidence requirements may exist in other circuits, such a requirement is not imposed by case law in . . . the Ninth Circuit, or the Supreme Court. See *Chalmers v. City of Los Angeles*, 762 F.2d 753, 761 (9th Cir. 1985) (upholding emotional damages based solely on testimony); *Johnson v. Hale*, 13 F.3d 1351, 1352 (9th Cir. 1994) (noting that emotional damages may be awarded based on testimony alone or appropriate inference from circumstances); *Carey v. Piphus*, 435 U.S. 247, 264 n.20."

awarded him substantial damages. On appeal, the defendant argued that the plaintiff's claim was analogous to the common-law action for intentional infliction of emotional distress which in Pennsylvania requires, in addition to testimony by the plaintiff, corroboration through medical testimony. The Third Circuit rejected this argument, holding that state law should apply in § 1983 cases only if doing so is consistent with the Constitution and federal law. *Bolden*, 21 F.3d at 35. The *Bolden* Court noted "[t]hat the civil rights laws are intended in part to provide broad, consistent recompense for violations of civil rights. It is clear enough that this intention would be frustrated if we were to endorse the application of varying levels of proof depending upon the state in which the civil rights action arose." (internal citations omitted) *Id.*

Although the Court of Appeals in *Bolden* rejected the use of state tort law to alter a § 1983 plaintiff's burden of proof, the Respondents made and the District Court adopted the identical argument in the instant case. Instead of analogizing Bentley's claim of emotional distress to the tort of intentional infliction of emotional distress, the Respondents argued that Bentley's claim most resembled the New Jersey tort of negligent infliction of emotional distress and so, as required by New Jersey state law, Bentley was required to prove she suffered "severe" emotional distress in order to recover damages.[12]

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[12] The Third Circuit, apparently recognizing the District Court's clear error in light of its earlier unequivocal holding in *Bolden*, provided in footnote 2 of its opinion the following enigmatic explanation for its holding:

It is undisputed that fraudulent and fabricated claims of emotional distress are easy to make and often difficult to detect. It is also undisputed that the denial of constitutional rights may result in real and significant emotional distress. The law has long recognized that jurors and judges who see and hear the witnesses can much more accurately determine the extent to which an individual has truly suffered emotional distress, both from the words uttered and the manner in which the witness testifies, than can appellate court judges who see only words on a cold record. As the Fifth Circuit observed of damage awards based on intangible harm, "the harm is subjective and evaluating it depends considerably on the demeanor of witnesses." *Giles v. GE*, 245 F.3d 474, 487-88 (5th Cir. 2001), *quoting Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 937-38 (5th Cir. 1996).

In *Carey*, this Court cited with approval Justice Harlan's observation "[t]hat the experience of judges in dealing with private [tort] claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of [constitutional] rights." *Carey*, 435 U.S.

Because the record as a whole supports the District Court's rulings, we express no opinion as to whether the District Court was correct in holding that a standard of "severe" emotional distress was required, or whether the proper showing should have been "actual injury" resulting from the denial of procedural due process and the resulting delay in adjudicating Bentley's challenge to her suspension. *See Carey v. Piphus*, 435 U.S. 247 (1978); *Bolden v Se. Pa. Transp. Auth.*, 21 F.3d 29, 34 (3d Cir. 1994).

at 259, *quoting Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 409 (Harlan, J., concurring in judgment). In affirming the District Court's imposition of a substantial additional factor to be proved by Bentley in order to obtain damages for emotional distress, the Court of Appeals endorsed a standard not embraced by this Court or any other Court of Appeals. If left undisturbed, this holding will advance the agenda of some, to eliminate all but nominal damages for the violation of a constitutional right.

The Court should grant this petition to consider exactly what level of proof must be adduced in a § 1983 claim for damages for emotional distress.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

David S. Dessen, Esquire
Counsel of Record

DESSEN, MOSES & ROSSITTO
600 Easton Road
Willow Grove, PA 19090
ddessen@dms-lawyer.com
(215) 658-1400

(any footnotes trail end of each document)
NOT PRECEDENTIAL
No. 09-3069
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JANE BENTLEY,
Appellant

v.

ATLANTIC COUNTY, NEW JERSEY; THE OFFICE OF THE SHERIFF OF ATLANTIC COUNTY, NEW JERSEY; JAMES MCGETTIGAN, Individually and in his official capacity as Sheriff of Atlantic County; JOSEPH CONNELY

May 26, 2010, Submitted
Under Third Circuit LAR 34.1(a)
May 27, 2010, Filed

Appeal from the United States District Court for the District of New Jersey. (D.C. Civil No. 05-cv-02942).

Before: McKEE, Chief Judge, RENDELL and GARTH, Circuit Judges.

OPINION OF THE COURT

RENDELL, Circuit Judge.

Jane Bentley appeals the District Court's grant of partial summary judgment and its pre-trial and trial rulings. The District Court granted summary judgment in favor of Atlantic County, New Jersey, Sheriff James

McGettigan, and Under Sheriff Joseph Connelly (collectively, Defendants) on Counts II through V of Bentley's complaint, alleging discrimination based on Bentley's race and gender. The District Court held a trial on Count I, in which Bentley urged that her procedural due process rights were violated when she was suspended from her employment.[1]

Because we write for the parties who are familiar with the factual context and procedural history of this case, we recite only the facts that are relevant to our analysis. Bentley was employed as a Sheriff's Officer in Atlantic County, New Jersey. On November 5, 2003, Bentley was suspended with pay pending a psychological evaluation, after an incident that led her superiors to question her ability to perform her job. However, Bentley was not informed as to whether her suspension was disciplinary or non-disciplinary in nature. On December 2, 2003, after a psychologist found her unfit for duty, Bentley was suspended without pay and was required to complete the recommended treatment before returning to active duty.

On November 13, 2003, Bentley filed a grievance and sought arbitration through the Public Employment Relations Commission of the State of New Jersey. However, the appeals process for employees under the New Jersey Administrative Code differs for disciplinary and non-disciplinary suspensions. Because Bentley's suspension was not disciplinary, the proper procedure to contest the suspension was to appeal to the New Jersey Merit System Board. On November 12, 2004, Bentley appealed to the Merit Board. On July 28, 2005, the Merit Board ruled that:

> Where, as here, an employer has legitimate concerns regarding a public safety employee's psychological fitness for duty, the employer is entitled, perhaps required, to act in the best interests of the public that it serves. Thus, the Board finds that the appellant's initial separation from duty with pay, pending her psychological evaluation, was warranted under the circumstances and did not constitute disciplinary action.

App. 492.

The District Court determined that the Defendants had violated Bentley's procedural due process rights by failing to give her prompt notice that the suspension was not disciplinary so that she would know to appeal to the Merit Board. However, the District Court also ruled that, because Bentley did have a meaningful opportunity to be heard in front of the Merit Board, and her suspension was upheld, the only procedural due process violation was the Defendants' failure to provide prompt notice of the type of suspension. The District Court also ruled that in order to recover damages Bentley would have to show that she suffered severe emotional distress from the delay of the Merit Board appeal, as opposed to from the suspension itself.[2] The Court had the jury decide, as a preliminary matter, the date that Bentley's attorney, Steven Cohen, was told that the Sheriff considered the suspension to be non-disciplinary. This date would end the delay that allegedly caused Bentley emotional distress. The jury found that Cohen learned that the Sheriff considered the suspension non-disciplinary sometime between November 13, 2003 and January 2004. Given that

finding, Bentley conceded that she could not prove the delay caused her severe emotional distress. The District Court then entered judgment in her favor for $ 1.00 as nominal compensation for the violation of Bentley's constitutional right to procedural due process. We will affirm the District Court's rulings on Bentley's due process claim substantially for the reasons set forth by the District Court.

The District Court granted summary judgment in the Defendants' favor on Counts II through V because Bentley did not adduce sufficient evidence to support a reasonable inference of discrimination based on her race or gender. On appeal, Bentley refers to internal investigation files of other Sheriff's Officers whom she alleges were treated differently. The files were never made part of the record in the District Court (or on appeal) and therefore cannot be considered on appeal. *See, e.g., Brown v. J. Kaz, Inc.*, 581 F.3d 175, 179 (3d Cir. 2009) (quoting Giles v. Kearney, 571 F.3d 318, 322 (3d Cir. 2009) ("A court may grant summary judgment only when the record shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.") (emphasis added).[3] Thus, we agree that the evidence adduced was insufficient and will affirm the District Court's grant of summary judgment on Counts II through V of Bentley's complaint.

Accordingly, we will affirm all of the orders of the District Court that Bentley challenges on appeal.

Footnotes

1The trial was actually a second trial, but that does not affect our ruling.

2Because the record as a whole supports the District Court's rulings, we express no opinion as to whether the District Court was correct in holding that a standard of "severe" emotional distress was required, or whether the proper showing should have been "actual injury" resulting from the denial of procedural due process and the resulting delay in adjudicating Bentley's challenge to her suspension. *See Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978); *Bolden v. Se. Pa. Transp. Auth.*, 21 F.3d 29, 34 (3d Cir. 1994).

3As noted by the District Court, even though the investigation files were produced subject to a protective order, Bentley could have included them in the record simply by filing them under seal. *See* L.A.R. 106.1(a).

Civil No. 05-2942 (RMB)
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JANE E. BENTLEY,
Plaintiff,

v.

JAMES MCGETTIGAN, Defendant.

JUDGMENT IN A CIVIL CCASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that, pursuant to Federal Rule of civil Procedure 50(a), judgment as a matter of law be entered in favor of Defendant James McGettigan and against Plaintiff Jane E. Bentleys claims for compensatory damages for severe emotional distress and for punitive damages; and

IT IS FURTHER ORDERED AND ADJUDGED that a judgment as a matter of law be entered in favor of Plaintiff Jane E. Bentley and against Defendant James McGettigan for nominal damages in the amount of $1.00.

Date June 25, 2009

/s/ Renee Marie Bumb
RENEE MARIE BUMB
UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION
Civil No. 05-2942 (RMB)
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JANE E. BENTLEY,
Plaintiff,

v.

ATLANTIC COUNTY, NEW JERSEY, et al.,
Defendants.

August 18, 2008, Decided
August 18, 2008, Filed

MEMORANDUM AND ORDER

On June 2, 2008, this Court conducted a conference to address various issues raised by the parties in the Joint Final Pretrial Order (the "PTO"). At the conference, the Court expressed its concern that Plaintiff's legal claims set forth in the PTO went beyond the Court's prior rulings. The Court therefore ordered the parties to submit trial briefs in preparation for the September 15, 2008 trial.

Upon review of the parties' trial submissions [Dkt. Entries Nos. 82 and 85], it is evident to the Court that the Plaintiff is seeking to pursue a new claim that was never addressed by the various pre-trial submissions in this case. Suffice it to say that Plaintiff's case has evolved and transformed since the filing of the complaint more than three years ago. At the time of the filing of the PTO, however, only one claim remained -

Plaintiff's procedural due process claim. Yet, the PTO, as well as Plaintiff's Trial Brief, pursue still another claim. Although this Court could exercise its discretion and preclude Plaintiff from presenting a new claim at this late juncture, it will not do so. The Court will, however, reject the new claim on its merits, for the reasons discussed below.

As set forth in the Court's Order, dated January 4, 2008, the Court permitted Plaintiff to proceed on her procedural due process claim, as alleged in Count I of the Complaint. That claim is solely a claim that her constitutional due process rights were violated because she was not provided a prompt post-deprivation hearing concerning her November 5, 2003 suspension.

The parties have spent considerable time and effort in their Trial Briefs arguing whether or not Plaintiff's suspension was disciplinary and which section of the New Jersey Civil Service System governed her appeal process. Specifically, Plaintiff claims that under § 4A:2-2.5 of the New Jersey Administrative Code ("§ 2-2.5"), Defendants were required to give Plaintiff, within five days following the suspension, a Preliminary Notice of Disciplinary Action ("PNDA") with opportunity for a hearing. By failing to follow § 2-2.5, Plaintiff argues, Defendants violated Plaintiff's due process rights. [1] Defendants claim that § 2-2.5 did not apply because the suspension was deemed "not disciplinary", but even if it did, their non-compliance with § 2-2.5 was irrelevant because Plaintiff always had the general right to appeal the appropriateness of her suspension to the Merit System Board pursuant to § 4A:2-1.1 ("§ 2-1.1").

However, these issues are nothing more than tempting

red herrings because there is no claim in this case that Defendants violated Plaintiff's state law rights under the New Jersey Civil Service Act. The real question underlying Plaintiff's due process claim is not whether the suspension was disciplinary or which section of the New Jersey Civil Service System governed her appeal process or even whether Defendants complied with the New Jersey Civil Service System, but whether Defendants afforded Plaintiff the minimum amount of due process required by the Constitution. [2]

Plaintiff appears to argue that a violation of § 2-2.5 is per se a constitutional violation. This Court disagrees. While § 2-2.5 may provide a review process that satisfies the requirements of constitutional due process, it does not define the minimum process due to Plaintiff under the Constitution nor does it offer the only means of providing due process. See, e.g., *Vitek v. Jones*, 445 U.S. 480, 491, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980) (state policy does not "answer[] the question of what process is due under the Constitution"). Indeed, "[t]here is no rote formula for sufficient protections under the Due Process Clause. Rather, 'due process is flexible and calls for such procedural protections as the particular situation demands.'" *Wilson v. MVM, Inc.*, 475 F.3d 166, 178 (3d Cir. 2007) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)).

The record shows that Plaintiff was suspended on November 5, 2003. Although she was not issued a formal PNDA in connection with her suspension, Plaintiff did eventually avail herself of the opportunity for review of the Sheriff's decision to suspend her by filing an appeal with the Merit Board on November 12, 2004. (Pl. Trial Br. at 10). Defendants filed a response

on November 29, 2004. (*Id.*). Plaintiff then filed a reply on January 10, 2005, in which she "argued that the record neither supported a finding that Bentley was unfit for duty nor supported Dr. Gallegos' recommendation for six (6) months of psychotherapy." (*Id.*). On July 28, 2005, the Merit Board issued its decision, ruling that Plaintiff's suspension was reasonable and that Plaintiff must comply with Dr. Gallegos' recommendation before she could be reinstated.

Plaintiff now appears to argue a new claim, that the Merit Board's review of her suspension was inadequate under the due process requirements because "there was no hearing in which Bentley could contest the facts relied upon by the Sheriff..." (Pl. Trial Br. at 11). First, as the Court has already noted, this is a new claim raised by the Plaintiff. On that basis alone, the Court could deny it. Nowhere in her previous papers (except the PTO) did Plaintiff discuss the adequacy of the Merit Board's review. Nonetheless, the Court will address the claim and reject it because it has no merit.

The Supreme Court has held that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews, 424 U.S. at 333. However,

> [a]n individual's due process right to an opportunity to be heard does not ensure a hearing in all contexts. To so require would grind judicial and administrative gears to a screeching halt. Thus, an individual's due process right to an opportunity to be heard can be preserved by courts or administrative bodies in many different

> ways. The constitutional requirements of due process are not technical, nor is any particular form of procedure always necessary to provide due process.

Elliott v. Kiesewetter, 98 F.3d 47, 60 (3d Cir. 1996) (citing *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 609, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974)). How "intensive" the process must be is,

> a determination that depends on the balancing of three interests: (1) the private interest at stake, (2) the risk of error in the procedure used compared with the degree of improved accuracy that additional procedures would provide, and (3) the government's interest.

Wilson, 475 F.3d at 178 (citing *Mathews*, 424 U.S. at 334-35).

In Wilson, court security officers who had been termed "medically disqualified" challenged their employers' decision to terminate them, arguing, in part, that they were denied due process. The Third Circuit affirmed the district court's conclusion that the plaintiffs were provided with sufficient process because they "were provided with notice of their medical disqualification and offered an opportunity to respond with medical documentation from their own doctors regarding their ability to perform their positions." *Id.* at 179. The court further explained,

> [w]hile this is not a traditional hearing, the process afforded the appellants is sufficient given the balance of their interest in maintaining

> employment and the government's interest in security. A more rigorous process would not significantly enhance the accuracy of the medical qualification process.

Id. (citing *Mathews*, 424 U.S. at 335).

In this case, Plaintiff had the opportunity to present her case to the Merit Board for review. Although a formal hearing was not held, she submitted a brief that argued the merits of her case. Indeed, a review of the Merit Board's decision shows that the Board heard and considered Plaintiff's side of the story, including the report of Plaintiff's own psychiatrist, Dr. Hewitt, who found Plaintiff to be fit for duty. (See Administrative Appeal, dated July 28, 2005 (attached as Ex. I to Def. Motion for Summary Judgment [Dkt. No. 58]) at 5-6). Just as the plaintiffs in Wilson had the opportunity to submit medical documentation from their own doctors regarding their ability to perform their positions, Plaintiff in this case also had the opportunity to submit her own psychiatrist's report regarding her fitness for duty. Moreover, after Defendants submitted their opposition brief, Plaintiff submitted a reply brief. Thus, she had the opportunity not only to set forth her own arguments, but also to contest Defendants' arguments.

Based on the undisputed record regarding the Merit Board's review, this Court finds that the review Plaintiff received was adequate given the balance of Plaintiff's interest in not being suspended or undergoing unnecessary intensive psychological treatment and the government's interest in maintaining security. As was the case in *Wilson*, a more formal hearing process would not significantly enhance the

accuracy of the decision to suspend temporarily employees who are believed to be psychologically unfit for duty. [3] See, e.g., *Mathews*, 424 U.S. at 343-44 (noting that inquiries involving medical assessments are "sharply focused and easily documented" and, thus, the need for evidentiary hearing is diminished). Thus, balancing the interests at stake, this Court finds that Plaintiff was afforded the opportunity to be heard "in a meaningful manner."

However, even though Plaintiff was heard "in a meaningful manner," it appears that she was not afforded such opportunity "at a meaningful time." The record shows that over one and one-half years passed between the time of Plaintiff's suspension on November 5, 2003, and the decision of the Merit Board on July 28, 2005. Defendants' failure to provide Plaintiff with any direction as to the appropriate appeal process caused or at least contributed to this delay. [4] Thus, Defendants did not provide Plaintiff a prompt review of her case, which does amount to a constitutional due process violation.

Perhaps following Plaintiff's lead, Defendants also raised a new argument for the first time at the June 2, 2008 status conference. Essentially, Defendants claim that, despite their failure to inform Plaintiff of the proper appeal process, they are not liable for the delay of Plaintiff's review by the Merit Board because Plaintiff's attorney was aware of the proper appeal process. Because the knowledge of Plaintiff's attorney is imputed to Plaintiff, Defendants argue, Plaintiff was already aware that she could (or should) appeal her case directly to the Merit Board. Thus, Defendants conclude, "due process would not require notifying the plaintiff of

that which, actually or constructively, she already knew." (Def. Trial Br. at 15).

However, this argument does not carry the day. The attorney's legal knowledge of the proper appeal process does not address Plaintiff's (and, thus, her attorney's) lack of factual knowledge that ultimately caused the delay - i.e., Plaintiff did not know that the Sheriff had characterized her suspension as "not disciplinary." As the Court explained in its opinion dated April 16, 2008, without this factual information, neither Plaintiff nor her attorney, armed with legal knowledge, could have known that § 2-1.1 applied as opposed to § 2-2.5. In short, the attorney's understanding of the law did not eliminate the factual confusion. Thus, the Court rejects Defendants' new argument that the attorney's legal knowledge defeats Plaintiff's due process claim. [5]

At this point, the Court has rejected all of Defendants' legal arguments regarding liability for the delay and the parties have agreed that there are no factual issues surrounding the delay. Thus, it appears liability is no longer an issue. Since the Court has determined that Plaintiff received the process due to her under the Constitution via the Merit Board's review, but that such process was unduly delayed by Defendants, Plaintiff may pursue her claim for damages that she alleges resulted from that delay. Accordingly, the Court finds that the only issue remaining for trial is the amount of damages Plaintiff is entitled to because of the delay.

As to damages, Plaintiff asserts that, under *Carey v. Piphus*, 435 U.S. 247, 260, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978), she is entitled to compensatory damages

unless Defendants prove that Plaintiff would have been suspended and found psychologically unfit even if a "proper hearing" had been held. (Pl. Trial Br. at 13). She further contends that "had she been afforded a hearing as required by the Fourteenth Amendment and the New Jersey Civil Service Act, she would have established that she suffered from no psychological illness or condition that made her unfit for duty and that Dr. Gallegos' recommendation that she be kept out of work for six months was unsupported by the results of his evaluation." (Pl. Trial Br. at 21). Thus, Plaintiff argues, she is entitled to backpay and pension benefits from December 2, 2003 through her mandatory retirement on February 29, 2008. (*Id.*).

In response, Defendants argue that because the constitutional violation is Defendants' failure to advise Plaintiff of her right to appeal the suspension to the Merit System Board, "the damages depend on what would have occurred if the plaintiff had been advised of that right and had taken an earlier appeal to the Board." (Def. Trial Br. at 11). Defendants claim that "[t]he obvious answer is that the same result would have occurred, only earlier, and [thus,] the plaintiff will be entitled to recover only nominal damages." (*Id.* (citing *Carey*, 435 U.S. at 259-267)).

The Court finds that Defendants have met their burden. As discussed above, the Court has determined that Plaintiff did have an adequate review by the Merit Board; the only reason the review fell short of the constitutional due process requirements was because it was unduly delayed. It is highly unlikely - indeed, wishful thinking - that the timing of the review would affect the substance or outcome of the review. That is,

the Court finds that if Plaintiff had appealed to the Merit Board a year earlier, the result would be exactly the same; it simply would have occurred earlier. Accordingly, Defendants are correct and Plaintiff is not entitled to compensatory damages, but to nominal damages. See *Carey*, 435 U.S. at 266 ("the denial of procedural due process should be actionable for nominal damages without proof of actual injury").

Additionally, to the extent Plaintiff can prove that she suffered emotional distress from the procedural due process violation, Plaintiff is entitled to damages as determined by a jury. *Id.* at 264 ("mental and emotional distress caused by the denial of procedural due process itself is compensable"). However, as recognized in Carey, "where a deprivation is justified but procedures are deficient, whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure." *Id.* at 263. Thus, Plaintiff must "convince the trier of fact that [s]he actually suffered distress because of the denial of procedural due process itself" - in this case, that is the delay. *Id.* at 263 (emphasis added).

In summary, the only issue remaining for trial is the amount of damages to which Plaintiff is entitled as a result of the delay in obtaining a review by the Merit Board. Because the Court has found that the ultimate decision of the Merit Board would not have been any different had the review been conducted earlier, Plaintiff is only entitled to nominal damages for the violation itself. However, Plaintiff may recover for any emotional distress that she suffered as a result of the delay. This issue of emotional distress is the only factual issue that must be resolved by a jury - i.e.,

whether Plaintiff suffered emotional distress because of the delay and, if so, the amount of damages she deserves.

In light of the foregoing, the parties are instructed to prepare a new joint final pretrial order. A proposed joint final pretrial order shall be submitted to the Court on or before September 5, 2008. Plaintiff shall submit the first draft to opposing counsel no later than August 25, 2008. The Court will conduct a final pre-trial conference on September 12, 2008 at 10:00 a.m. and trial will commence as previously scheduled.

Dated: August 18, 2008

/s/ Renee Marie Bumb
RENEE MARIE BUMB
UNITED STATES DISTRICT JUDGE

Footnotes

1 It is undisputed that Defendants did not comply with § 2-2.5.

2 Plaintiff also argues that her right to constitutional due process is not dependant on how her suspension was characterized. However, Defendants do not argue that Plaintiff was not entitled to due process; rather, they argue that Plaintiff received due process. Thus, the Court need not address this argument.

3 The Court notes that unlike the situation in Wilson, where plaintiffs suffered a permanent deprivation (i.e., job termination), Plaintiff here suffered a temporary deprivation (i.e., suspension until deemed

psychologically fit). This distinction weighs in favor of affording Plaintiff even less formal process than was afforded the plaintiffs in Wilson.

4 This issue of delay is what the Court has consistently viewed as the only legal issue remaining in the case.

5 Of course, this evidence might be relevant to Plaintiff's claim for emotional distress. See infra.

NOT FOR PUBLICATION
Civil No. 05-2942 (RMB)
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JANE E. BENTLEY,
Plaintiff,

v.

ATLANTIC COUNTY, NEW JERSEY, et al.,
Defendants.

March 6, 2008, Decided
March 6, 2008, Filed

OPINION

BUMB, United States District Judge:

This matter comes before the Court upon three motions filed by Defendants: a motion for summary judgment as to Count I of the Complaint, a motion for leave to file a late motion for summary judgment as to Counts II and V of the Complaint, and a late motion for summary judgment as to Counts II and V of the Complaint. For the reasons stated below, Defendants' motion as to Count I is denied, Defendants' motion for leave to file out of time is granted, and Defendants' motion as to Counts II and V is granted.

I. PROCEDURAL BACKGROUND [1]

Defendants' initial motion for summary judgment, filed on January 26, 2007, sought summary judgment as to

Counts I, III, and IV of the Complaint, but failed to address Counts II and V. [Dkt. No. 35]. On August 16, 2007, the Court granted Defendants' motion for summary judgment as to Counts I, III and IV. [Dkt. No. 53]. However, on January 4, 2008, the Court granted Plaintiff's request for reconsideration as to Count I. [Dkt. No. 56]. Thus, at this point, only Counts I, II, and V remain.

During the oral argument on January 4, 2008, the Court instructed Defendants to submit a new motion for summary judgment as to Count I, and Defendants now so move. Defendants have also moved for leave to file a late motion for partial summary judgment as to Counts II and V, which were not addressed in their initial motion for summary judgment, and for summary judgment on those counts.

I. STANDARD OF REVIEW

Summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *Hersh v. Allen Products Co.*, 789 F.2d 230, 232 (3d Cir. 1986). A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A fact is "material" only if it might affect the outcome of the suit under the applicable rule of law. *See id.* Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment. *See id.* "In making this determination, a court must make all reasonable inferences in favor of the non-movant." *Oscar Mayer*

Corp. v. Mincing Trading Corp., 744 F. Supp. 79, 81 (D.N.J. 1990) (*citing Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307 n.2 (3d Cir. 1983)). "At the summary judgment stage the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

II. DISCUSSION

A. Count I - Procedural Due Process

During the January 4, 2008 oral argument on Plaintiff's motion for reconsideration, the Court sought to clarify Plaintiff's argument as to Count I. After Plaintiff explained the basis for that claim, the Court permitted Defendants to submit a renewed motion for summary judgment as to Count I and the Defendants have now done so. [2]

As clarified at oral argument, Plaintiff claims that her due process rights were violated because she was not provided a prompt post-deprivation hearing concerning her November 5, 2003 suspension, as required by § 4A:2-2.5 of the New Jersey Administrative Code ("§ 2-2.5"). § 2-2.5 provides, in relevant part,

> (a) An employee must be served with a Preliminary Notice of Disciplinary Action setting forth the charges and statement of facts supporting the charges (specifications), and afforded the opportunity for a hearing prior to imposition of major discipline, except:
>
> 1. An employee may be suspended immediately

> and prior to a hearing where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job... However, *a Preliminary Notice of Disciplinary Action with opportunity for a hearing must be served ... within five days following the immediate suspension.*

N.J.A.C. § 4A:2-2.5 (emphasis added). Plaintiff claims that Defendants' failure to issue her a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and providing an opportunity for a hearing violated her due process rights.

Defendants argue that § 2-2.5 did not apply to Plaintiff's case because the suspension was not disciplinary in nature. They further argue that even if § 2-2.5 applied, Defendants' non-compliance with that section is irrelevant because Plaintiff always had the general right to appeal the appropriateness of her suspension to the Merit System Board pursuant to § 4A:2-1.1 ("§ 2-1.1").

1. Disciplinary Nature of Plaintiff's Suspension

Defendants first argue that § 2-2.5 did not apply because Plaintiff's suspension was not disciplinary. (Def. Motion at 5, 7, 9). They argue that the Sheriff "opted not to file disciplinary charges against the plaintiff so she could use accumulated leave time to get the recommended treatment." (*Id.* at 7). Moreover, Defendants argue, the Merit System Board (the "Board") conducted its own review of the situation and concluded that the suspension "did not constitute

disciplinary action." (Administrative Appeal, Def. Motion Ex. I at 7). [3]

However, the Board's conclusion that the suspension was not disciplinary in nature was based on its own factual finding that Defendants had "legitimate concerns regarding a public safety employee's psychological fitness for duty." (*Id.*). This Court need not adopt the Board's factual findings or conclusions, particularly where they are disputed by Plaintiff. Indeed, where material issues of fact persist, summary judgment is not proper.

2. Notification of Available Remedies

Defendants also argue that even if § 2-2.5 applied, Defendants' failure to comply with that section did not deprive Plaintiff of her due process rights because § 2-1.1 provided Plaintiff a general right to appeal the suspension. However, there is no evidence that Plaintiff was ever informed of this procedural avenue or any other means of challenging the suspension.

The Supreme Court has held that notice "does not comport with constitutional requirements when it does not advise the [individual] of the availability of a procedure for protesting [the action]." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978)); *see also Atkins v. Parker*, 472 U.S. 115, 152, 105 S. Ct. 2520, 86 L. Ed. 2d 81 (1985) (J. Brennan, dissent) ("[a]dequate notice under the Due Process Clause has two components. It must inform affected parties of the action about to be taken against them as well as of *procedures available for challenging that action*") (emphasis added); *Mackey v. Montrym*,

443 U.S. 1, 27, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979) (J. Stewart, dissent) ("without notice, the remedy, even if it exists, is hardly a meaningful safeguard" to due process); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950) ("[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated ... to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections")).

Thus, even if the suspension was not disciplinary (meaning Defendants did not have to comply with § 2-2.5), Defendants had an obligation to notify Plaintiff of the appeal procedure available to her under § 2-1.1. [4] There is no evidence showing that Defendants met this obligation. Indeed, it appears that this lack of information is what led Plaintiff to challenge the suspension through the grievance procedure, which turned out to be the wrong avenue. By the time Plaintiff found her way to the Board, over one year had passed. Even the Board recognized "the apparent confusion regarding the nature of the employment action" and agreed to relax the rule deadlines and hear Plaintiff's untimely appeal. [5]

If Defendants failed to apprise Plaintiff of the procedural options to challenge the suspension, such failure may have led to Plaintiff's confusion and ultimately delayed her post-deprivation hearing, which could be deemed a violation of due process. Thus, the issue of whether Defendants provided Plaintiff with sufficient notice of the appeal procedure is a factual one that precludes summary judgment at this time.

Accordingly, Defendants' motion for summary judgment as to Count I must be denied.

B. Counts II and V - § 1981 and New Jersey Civil Rights Act

1. Motion for Leave to File Out of Time

Pursuant to the Amended Scheduling Order issued by Magistrate Judge Donio on October 13, 2006, dispositive motions in this matter were to be filed no later than January 31, 2007. Defendants now move for leave to file a late motion for partial summary judgment as to Counts II and V, which were not addressed in their initial timely-filed summary judgment motion.

In his Certification in support of this motion, current counsel for Defendants asserts that the requested leave should be granted because the failure to address Counts II and V was an inadvertent "technical failure." (Crammer Cert. at ¶¶ 11-12). He submits that counsel at the time believed that "the arguments on the plaintiff's other claims of race and gender discrimination were dispositive of the 42 U.S.C.A. 1981 and New Jersey Civil Rights Act claims." (*Id.* at ¶ 11). Having confirmed that the remaining Counts II and V present no new legal issues, counsel now argues that the Court's ruling on Counts III and IV (granting summary judgment) is legally dispositive of Counts II and V. Accordingly, counsel contends, by allowing Defendants leave to file this late motion for summary judgment, the Court will avoid a useless trial as to these claims, which would result in an inevitable motion for a directed verdict. Finally, Defense counsel submits that Plaintiff will not suffer any prejudice due to delay if the Court grants its motion, as Defendants have

already been permitted to file a renewed motion for summary judgment as to Count I.

In her opposition, Plaintiff argues that even though Defendants may be correct that a motion for a directed verdict would be inevitable, "the Court's decision on such a Motion is not." (Pl. Opp. at 3). Plaintiff contends that despite the Court's conclusion, based on the "cold record of deposition testimony[,]" that Plaintiff did not establish a prima facie case of discrimination, the events and testimony presented at trial may convince the Court otherwise. (*Id.*). Additionally, Plaintiff argues that granting Defendants' motion would be improper because Defendants have failed to show good cause and delaying the trial further would be prejudicial to her.

Under the Federal Rules of Civil Procedure, this Court has discretion in determining whether to extend deadlines, such as the one at issue in this case:

> [w]hen ... by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any tie in its discretion ... upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect...

Fed. R. Civ. P. 6(b). Thus, to file a dispositive motion out of time, Defendants must show "excusable neglect." In determining whether a party has demonstrated excusable neglect, the Court must consider the following five factors:

> 1) whether the inadvertence reflected professional incompetence such as ignorance of rules of procedure; 2) whether an asserted inadvertence reflects an easily manufactured excuse incapable of verification by the court; 3) counsel's failure to provide for a readily foreseeable consequence; 4) a complete lack of diligence; or 5) whether the inadvertence resulted despite counsel's substantial good faith efforts towards compliance.

Dominic v. Hess Oil V.I. Corp., 841 F.2d 513, 517 (3d Cir. 1988). The Supreme Court has explained that the "excusable neglect" inquiry is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission," including, "the danger of prejudice to the [other party], the length of delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993).

In this case, the facts weigh in favor of granting Defendants leave to file their motion for summary judgment out of time. Counsel for Defendants filed the initial motion for summary judgment within the allotted time; as counsel has certified, the failure to address Counts II and V in that motion was an inadvertent "technical failure" or "oversight." This type of mistake does not demonstrate "a complete lack of diligence" but rather falls within the ambit of "excusable neglect."

Concerning the issue of prejudice, this Court finds that

allowing Defendants to file their motion out of time will not cause Plaintiff any unfair prejudice. Although Plaintiff argues that new evidence of discrimination may come to light during trial, this possibility is only the result of Defendants' inadvertent mistake. By excusing the mistake, the Court is not prejudicing Plaintiff, but merely preventing Plaintiff from achieving an unfair gain as a result of Defendants' inadvertent mistake. Moreover, the possibility that new evidence may alter the Court's conclusion seems unlikely given the dearth of any such evidence in the current record.

Similarly, in terms of timing, the Court finds that consideration of Defendants' late summary judgment motion will not cause any further delay of trial, as the Court has already decided all of the legal issues in the motion. On the contrary, allowing Plaintiff to proceed to trial on claims that have already been deemed legally deficient would be a waste of judicial time and resources. This factor militates in favor of granting Defendants' motion. *See, e.g., Thomas v. Kroger Co.*, 24 F.3d 147, 149 (11th Cir. 1994) (district court "may consider an otherwise untimely motion if, among other reasons, doing so would be the court of action most consistent with the interest of judicial economy") (internal quotations and citation omitted).

Finally, despite Plaintiff's argument, there is no evidence to suggest that Defendants have acted in bad faith. *See Raymond v. Int'l Bus. Machines Corp.*, 148 F.3d 63, 66 (2d Cir. 1998). As counsel has certified, the mistake was merely a "technical failure," not an attempt to delay trial.

Having considered all the relevant factors, this Court finds that Defendants' motion for leave to file a late motion for partial summary judgment as to Counts II and V of the Complaint should be granted.

2. Motion for Summary Judgment as to Counts II and V

Turning to the merits of Defendants' motion for partial summary judgment as to Counts II and V, Defendants argue that the Court "necessarily disposed of the plaintiff's claim of race discrimination under 42 U.S.C. 1981 [Count II] when it ruled that there was no evidence that the defendants intentionally discriminated against the plaintiff because of her race." (Def. Motion at 3). Likewise, Defendants argue, the Court disposed of Plaintiff's claim under the New Jersey Civil Rights Act (Count V) when it ruled that there was no evidence that any Defendant intentionally discriminated against Plaintiff because of her race or gender. (*Id.* at 7).

This Court finds Defendants' arguments persuasive. The legal issues presented in Counts II and V are the same as those in Counts III and IV. Count II is a claim under § 1981 and Count V is in essence a claim under § 1983. (*See* Def. Motion at 6, Ex. A). To state a claim under either § 1981 or § 1983, Plaintiff must make showings of discrimination as required by the *McDonnell Douglas* framework. *Stewart v. Rutgers*, 120 F.3d 426, 432 (3d Cir. 1997) (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 186, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989) (finding *McDonnell Douglas* framework applicable to claims under § 1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 n. 1,

113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) (applying *McDonnell Douglas* framework to § 1983)). This is precisely what Plaintiff failed to do in proving the claims set forth in Counts III and IV.

Given the Court's conclusions underlying its dismissal of Plaintiff's discrimination claims in Counts III and IV - namely that there is no evidence of discrimination - Plaintiffs' remaining claims cannot succeed. Accordingly, Defendants are entitled to summary judgment on the remaining Counts II and V.

III. CONCLUSION

For the aforementioned reasons, this Court holds that Defendants' motion for summary judgment as to Count I is denied, Defendants' motion for leave to file a late summary judgment motion as to Counts II and V is granted, and Defendants' motion for summary judgment as to Counts II and V is granted. An appropriate Order will issue this date.

Dated: March 6, 2008

s/ Renee Marie Bumb
RENEE MARIE BUMB
UNITED STATES DISTRICT JUDGE

Footnotes

1 The Court assumes the parties' familiarity of the facts and therefore will not recite them again.

2 The Court will consider Defendants' motion as to Count I despite the fact that it was filed two days late.

3 The Court notes that the decision of the New Jersey Public Employment Relations Commission (PERC) that the suspension could not be arbitrated if it was deemed to be "major discipline" addresses only the arbitrability of Plaintiff's grievance and provides no assistance concerning whether the suspension constituted disciplinary action.

4 This Court cannot support an interpretation of the New Jersey Administrative Code that permits the Sheriff to unilaterally characterize a suspension as not disciplinary and thereby avoid the due process obligation of informing an employee of the procedures available to challenge that suspension.

5 It seems that § 2-2.5 is intended to avoid the very type of confusion and delay caused here by explicitly requiring the Sheriff to notify the employee of the procedural mechanism for challenging a disciplinary action. Had Defendants issued Plaintiff a PNDA in accordance with § 2-2.5, Plaintiff would be hard pressed to demonstrate a due process violation.

No. 09-3069

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JANE BENTLEY,
Appellant

v.

ATLANTIC COUNTY, NEW JERSEY; THE OFFICE OF THE SHERIFF OF ATLANTIC COUNTY, NEW JERSEY; JAMES MCGETTIGAN, Individually and in his official capacity as Sheriff of Atlantic County; JOSEPH CONNELY

Appeal from the United States District Court for the District of New Jersey. (D.C. Civil No. 05-cv-02942).

Present: McKEE, Chief Judge, SLOVITER, SCIRICA, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, and GARTH,*
Circuit Judges.

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for

rehearing is hereby DENIED.

BY THE COURT:
/s/Marjorie O. Rendell
Circuit Judge
Dated: August 25, 2010

Footnote

* The vote of the Honorable Leonard I. Garth, Senior Judge of the United States Court of Appeals for the Third Circuit, is limited to panel rehearing only.

STATE OF NEW JERSEY
DEPARTMENT OF PERSONNEL

In the Matter of Jane Bentley,
Atlantic County

DOP Docket No. 2005-1839

Administrative Appeal

Issued: July 28, 2005

Jane Bentley,a Sheriff's officer with Atlantic County (County), represented by Stephen R. Cohen, Esq., appeals in order to submit to a psychological evaluation and her separation from duty, pending evaluation and her compliance with the results of that evaluation.

By way of background, on October 28, 2003, the county alleges that an incident occurred that resulted in the arrest of two females in the courthouse in which the appellant was assigned. Following the incident, the appellant allegedly entered an office in which one of these civilians involved in the incident was located and commented that she wanted to "see the nine officers who beat up that lady." When questioned about the incident by hearse. On November 5, 2003, the appellant allegedly stated that "it was bullshit," and she became agitated and refused to answer any questions.[1]

On November 5, 2003, based largely on this incident, the appellant was ordered to undergo a psychological fitness for duty evaluation and placed on a leave with pay, pending the results. On November 12, 2003, the appellant underwent an extensive psychological

valuation with Guillermo gallegos, Ph.D., a psychologist selected by the County. In Gallegos November 19, 2003 report, he found that the appellant was psychologically unfit for duty and a potential danger to herself and others at this time. As a result, he recommended that she undergo a complete neuropsychological evaluation in order to rule out a neurological condition contributing to her behavior, and he recommended that the appellant and her into treatment with a licensed mental health professional at least once per week for a period of six months. Gallegos indicated that the County should be provided periodic reports regarding the appellant's progress in therapy. Finally, Gallegos recommended that the appellant be afforded a medical leave of absence for at least six months, at which time a re-evaluation of her fitness for duty could be conducted.

The County advised the appellant on December 1, 2003 that she would not be permitted to return to work until she complied with the recommendations set forth in Gallegos report. The County also notified her that any further absences would be unpaid, unless she opted to utilize her accumulated leave time. On January 16, 2004, the appellant underwent a psychiatric examination by Dr. James L. Hewitt, a psychiatrist of her own choosing. In a February 10, 2004 report, Dr. Hewitt concluded that the appellant was fit for duty and not a danger to herself or others. While he noted that he "had no objection to further neuropsychological testing" or further treatment with a fair test, Dr. Hewitt did not feel that her return to work should be conditioned on her participation in such treatment.

The County forwarded Dr. Hewitt's report to Gallegos indicated that Dr. Hewitt's report did not alter his

opinion that the appellant was unfit for duty. Gallegos specifically noted that Dr. Hewitt was not provided with any records documenting the appellant's "repeated displays of inappropriate and disruptive behaviors." Gallegos also reiterated that his recommendation that the appellant enter into a course of psychotherapy was aimed at "set[ting] her on a course where she would hopefully be able to return to full duty."

On November 13, 2003, the appellant filed a grievance challenging her separation from duty, the directive to submit to a psychological evaluation, and alleging that, during the investigation into the October 28, 2003 incident, she was not provided with written information concerning the complaint against her and was denied an attorney and/or union representation when questioned about the incident. She subsequently filed a Request for Submission of a Panel of Arbitrators with the Public Employment Relations Commission(PERC), seeking binding arbitration of her "indefinite suspension and requirement to take a psychological evaluation." On July 1, 2004, the County petitioned PERC for a scope of negotiations determination, seeking to restrain arbitration of the appellant's grievance. In a decision dated October 28, 2004, PERC determined that the issues surrounding the appellant's psychological evaluation and "suspension," pending her participation in and compliance with the results of the evaluation, were not arbitrable. In this regard, PERC indicated that, "[t]o the extent the initial paid suspension [from November 6, 2003 through December 1, 2003] and the subsequent unpaid status [from December 1, 2003 through the present] are disciplinary, they constitute suspensions of more than five days and therefore major

discipline under civil service law." PERC also noted that the claims that were not subject to binding arbitration were properly addressed to the Merit System Board (Board).

Subsequently, by letter dated November 12, 2004, the appellant filed the instant appeal with the board. The appellant argues that the County inappropriately and unjustly ordered her to undergo a psychological fitness for duty evaluation. Specifically, she notes that, in addition to the October 28, 2003 incident, the County claims that another incident that occurred on June 10, 2003 formed the basis for ordering her to submit to psychological testing. The appellant asserts that the June 10, 2003 incident, in which she was accused of engaging in a verbal altercation with a Probation Officer, resulted in a Notice of Minor Disciplinary Action, recommending a one-day suspension. The appellant filed a grievance, challenging the propriety of this minor disciplinary action, and she was successful in an arbitration proceeding before PERC. She submits the October 9, 2004 opinion of PERC, which concludes that the County had not carried its burden of proof in demonstrating that it possessed just cost to discipline the appellant for this incident. Thus, the appellant argues that this incident cannot serve as a valid justification for requiring her to undergo a psychological valuation. The appellant also notes that she filed a timely appeal with the Board regarding her 30-day suspension for the October 28, 2003 incident, and she suggests that the present matter should be consolidated with that appeal.

In response, the County, were presented by Eric M. Bernstein, Esq., initially argues that the instant appeal

is untimely. Specifically, the County contends that the appellant seeks to appeal and order issued on November 5, 2003 that she submit to a psychological evaluation and her separation from duty from November 6, 2003 to the present. However, she did not present the instant appeal to the Board into November 12, 2004, while outside the 20-day time frame for filing an appeal set forth in N.J.A.C. 4A:2-1.1(b). the County contends that the appellant's decision to initially pursue this challenge in the wrong forum does not exempt her from the 20-day time frame. Additionally, the County argues that, if the appellant wished to use Dr. Hewitt's report, which found her fit for duty, as a basis to appeal the County's determination that she was unfit for duty, it was incumbent upon her to file an appeal in the appropriate forum within 20 days of receipt of Dr. Hewitt's report. Finally, the County of avers that, if the appellant's separation from duty is deemed disciplinary action, the instant appeal should have been filed within a reasonable time. See N.J.S.A. 11A:2-15 and N.J.A.C. 4A:2-28(b).

Nevertheless, with regard to the merits, the County asserts that its order that the appellants submit to a psychological evaluation was a proper exercise of its managerial prerogative and justified by numerous incidents. Specifically, the County contends that, beginning in February 1996, her superiors began having concerns with her behavior, and her February 1996 performance evaluation reflected observations that she would often argue with co-workers and raise her voice in an unprofessional manner. This concern was reiterated in March 1996, when she was "cited for disregarding a sergeant's order concerning assignment to workstations." In October 1997, the County asserts

that the appellant received an oral reprimand, when a former Assistant County Counsel filed a written complaint concerning the appellant's unprofessional conduct during child-support hearings. In April 2001, the appellant was reassigned following a written complaint from a child-support hearing officer that the appellant was audibly yawning and sighing during the hearings and making inappropriate comments to litigants, and she was disciplined for insubordination when she failed to comply with an order to take an individual into custody. The County also relies on two incidents in August 2002, in which the appellant was involved in loud confrontations with a member of the public and a co-worker. Similar incidents occurred on two occasions in September 2002. The County indicates that, following the June 10, 2003 incident involving a Probation Officer and a subsequent complaint received from the same Probation Officer in August 2003, it arranged for the appellant to undergo a psychological fitness for duty evaluation. However, based upon the appellant's representations that she would refrain from engaging in further inappropriate conduct, the County canceled be scheduled evaluation.

The County argues that the October 28, 2003 incident, coupled with the appellant's "bizarre" behavior during the investigation into that incident, justified its decision to move forward with the psychological evaluation. The County argues that it "has a right, as part of its managerial prerogative, to establish the qualifications for its employees and to take steps to ensure that all of its employees, in fact, meet those qualifications and are fit for duty." In support of this contention, the county cites Township of Bridgewater v. PBA Local 174, 196 N.J. Super. 258 (App. Div. 1984), wherein the Appellate

Division, noted an employer's right to require that it's Police Officer be physically fit to perform their duties and found that physical fitness and agility test designed to ascertain their ability to perform their duties were an extension of that right and non-negotiable. The County also relies on City of Newark v. Bellezzo, 159 N.J. Super. 123 (App. Div. 1978) ("Obviously, an inquiry into the physical condition of an employee concerning his ability to perform his duty is not a disciplinary action as commonly understood.") Thus, it argues that its refusal to permit the appellant returned to duty, pending her psychological evaluation and her compliance with the results of that evaluation were not disciplinary in nature. Rather, it was a "valid exercise of the County's manager of authority to ensure an employee's fitness for duty." Moreover, the County notes that, in Villani v. Passaic County Sheriff's Department (MSB, decided February 25, 1997), the Board upheld the removal of a Sheriff's Officer are based on his refusal to comply with an order to submit to a psychological evaluation. Thus, the County argues that the appellant's refusal to comply with the recommendations of its psychologist similarly constitutes a valid basis for the appellant's separation from duty.

In response, the appellant maintains that, given the circumstances, she filed the instant appeal in a timely manner. Initially, the appellant contends that the County's failure to clarify the employment action taken against her severely prejudiced her ability to file a challenge in the appropriate form. In this regard, the appellant argues that, if her separation from duty constituted major disciplinary action, the County's failure to follow any of the procedures outlined in Merit

System law and rules prevented her from filing an immediate appeal with the board. Thus, she asserts that she filed the instant appeal within a reasonable time of receiving clarification, in the form of PERCs determination, regarding the nature of the action taken against her. She emphasizes that she filed the instant appeal within 20 days of receipt of PERCs determination.

With regard to the merits, the appellant reiterates that the County cannot rely on the June 10, 2003 incident to justify its order that she submit to a psychological fitness for duty evaluation, since PERC determined that she was discipline without just cause for her role in this incident. With regard to the additional incidents cited by the County, which date back to 1997, the appellant contends that she "was not contemporaneously apprised of or disciplined for most of the alleged incidents and therefore has not had a meaningful opportunity to contest them." Moreover, the appellant asserts that Gallegos' report and recommendations are similarly flawed, since he relied, in part, on the June 10, 2003 incident as a basis for his opinion.

The appellant also maintains that her separation from duty, pending a psychological evaluation and her compliance with the recommendations set forth in Gallegos' report, constituted a de facto suspension. As such, she asserts that County was required to follow the procedures set forth in Merit System law and rules governing the major disciplinary process, which it utterly failed to do. Specifically, the appellant notes that the County failed to serve her with a Preliminary Notice of Disciplinary Action, setting forth the charges

in a statement of the facts supporting the charges, and it failed to afford her the opportunity for a departmental hearing regarding the propriety of her suspension. In addition, the County failed to make any final determination regarding the charges and issue a Final Notice of Disciplinary Action. Concerning the County's attempt to characterize her separation from duty as anything other than disciplinary action, the appellant argues that the cases cited by the County are clearly distinguishable. In this regard, she argues that the cases deal with the ability of an employer to mandate that an employee undergoing fitness for duty evaluation and to place the employee on a leave of absence pending the results of that evaluation. The appellant also emphasizes that, after submitting to an evaluation with the County's psychologist, she engaged the services of her own psychiatrist, Dr. Hewitt, who found her to be fit for duty.

In light of the above, the appellant urges the Board to find that the requirement that she submit to a psychological evaluation had no basis, since she was found to be without fault in the June 10, 2003 incident. Thus, she request that the Board reverse her de facto suspension and award her backpay and attorney's fees. In the alternative, the appellant contends that, if the Board has any concern regarding her psychological fitness for duty, it should refer the matter to the Medical Examiners Panel for independent review and assessment.

In response, the County emphasizes that the June 10, 2003 incident was one of many incidents involving the appellant that led to its determination that a psychological fitness for duty evaluation was

warranted. It also notes that it had attempted to mandate a psychological fitness for duty evaluation in August 2003, but the County agreed to forgo the evaluation when the appellant did acknowledge her troublesome behavior and agreed to improve upon it. In addition, the County argues that Dr. Hewitt's report is of little value, since he did not perform any psychological testing on the appellant or have access to the County's version of the events that justified the evaluation. The County emphasizes that Gallegos spent over six hours with the appellant, speaking to her at length and administering numerous psychological tests in order to make a reasoned assessment of her fitness for duty. Finally, the County asserts that "[p]rohibiting [the appellant] from returning to work is for the protection of [the appellant] and the public at large in light of the psychological report finding that [she] was a potential danger to herself and others."

In response, the appellant reiterates that her separation from duty was disciplinary in nature, and she argues that they County's attempts to characterize it in any other way is without merit. She maintains that, if the County's position was correct, employers would have, in effect, unfettered discretion to require employees to undergo fitness for duty evaluation's without any avenue appeal.

CONCLUSION

N.J.A.C. 4A:2-1.1(b) provides that an appeal must be filed within 20 days after you the appellant has notice or should reasonably have known of the decision, situation or action being appealed. In the instant matter, the appellant is challenging an order to submit

to a psychological evaluation on November 6, 2003, and her separation from duty commencing on that date. The instant appeal was filed by letter dated November 12, 2004 and was, thus, clearly out of time. Moreover, it is settled that pursuit of a claim in a different form does not hold a time limit for filing an appeal. See Murphy v. Department of Civil Services 155 N.J. Super. 491 (App. Div. 1978); County of Monmouth v. Communications Workers of America, 800 N.J. Super. 272, 288 (App. Div. 1997); In the Matter of Richard Vogel, Sr. (MSB, decided March 9, 1999). Nevertheless, N.J.A.C. 4A:1-1.2(c) permits the Board to relax the rule for good cause in a particular situation in order to effectuate the purpose of Title 11A of the New Jersey Statutes. The Board finds that the good cause exists under the particular circumstances of the present matter to relax the provisions of N.J.A.C. 4A:2-1.1(b). Specifically, given the apparent confusion regarding the nature of the employment action against the appellant, she chose to pursue a challenge that action through the filing of a grievance and binding arbitration act PERC. However, PERC opted not to address the issues presented in the instant matter in the event that the employment action was deemed disciplinary action, in which case it was not arbitrable. Specifically, PERC found that, "[t]o the extent the initial page suspension [from November 6, 2003 through December 1, 2003] and the subsequent unpaid status [from December 1, 2003 through the president] are disciplinary, they constitute suspensions of more than five days and therefore major discipline under civil service law." Due to the lack of clarity regarding the nature of the appellant's separation from duty, the Board will review the merits of the instant appeal, despite the untimely nature of the appeal.

In the instant matter, the appellant was initially separated from duty with pay on November 6, 2003, pending her submission to a psychological fitness for duty evaluation. The appointing authority asserts that it mandated such an evaluation due to a series of events in which members of the public and co-workers complained that the appellant had exhibited inappropriate and unprofessional conduct in the workplace. In light of the appellant's position as a law enforcement officer whose duties require frequent interaction with members of the public, the cited incidents, indeed, presented a cause of concern. It must be emphasized that require an employee to demonstrate her physical and/or mental fitness for duty, particularly when employed in such a sensitive public safety position, does not necessarily constitute disciplinary action. See Bellezza, supra. See also In the Matter of Anil Thomas (MSB, deccided January 7, 2004) ("A valid option for the City, consistent with the merit system law and rules, would have been to suspend the petitioner with pay, pending the expeditious scheduling and completion of appropriate expert evaluations.") Where, as here, an employer has legitimate concerns regarding a public safety employee's psychological fitness for duty, the employer is entitled, perhaps required, to act in the best interest of the public that it serves. Thus, the Board finds that the appellant's initial separation from duty with pay, pending her psychological evaluation, was warranted under the circumstances and did not constitute disciplinary action.

Following the appellant's psychological evaluation by Gallegos, the County's psychologist, a detailed report was issued in which Gallegos concluded that the appellant was unfit for duty and was precluded from

carrying a weapon. However, Gallegos did not conclude that the appellant's condition was permanent; rather, he recommended a complete and neuropsychological evaluation to rule out any neurological condition contributing to the appellant's behavior and a course of psychotherapy. With such treatment, Gallegos opined that the appellant may have been able to return to work at a later date. Based on the possibility that the appellant's unfitness for duty was temporary in nature, the County opted not to bring disciplinary charges against her. Instead, the County presented the appellant with the option of utilizing her accumulated leave time in order to obtain the necessary treatment, which she did, with an eye towards her eventually returning to work. Essentially, the County was offering the appellant a leave of absence, based on the opinion of its psychologist that she was unable to continue in the performance of her duties. While it is evident that the County could have pursued disciplinary charges against the appellant at this time based on her unfitness for duty and removed or suspended the appellant without pay for a finite period of time, the County did not pursue this option, in light of the medical and possibly temporary nature of her unfitness. It must also be emphasize that Dr. Hewitt, the appellant's psychiatrist, did not disagree with Gallegos' treatment recommendations; his only disagreement with Gallegos' report was that the appellant should not be precluded from working pending further treatment. Thus, the Board finds that the appellant's separation from duty following the issuance of Gallegos' report was, likewise, not disciplinary in nature; rather, it constituted a leave of absence in order for the appellant to seek treatment recommended by Gallegos and Dr. Hewitt.

However, the Board also finds that, commencing with receipt of Gallegos' April 8, 2004 report, the County was required to initiate disciplinary proceedings against the appellant in order to continue her separation from duty. At that point in time, the County had notice that the appellant was not actively pursuing treatment and that Gallegos and Dr. Hewitt disagreed regarding her fitness for duty. In practical terms, the appellant's separation from duty after April 8, 2004 was involuntary and, hence, disciplinary in nature. See In the Matter of Anthony Recine (MSB, decided March 10, 1998). Although the County failed to initiate formal disciplinary proceedings at this time, the appellant has not demonstrated that she is entitled to any relief for the County's procedural violations. As an initial matter, in the absence of any evidence that the appellant has made any attempt to comply with the treatment recommendations of both Gallegos and Dr. Hewitt, the Board will not require the County to return the appellant to her position as a law enforcement officer. In addition, the appellant has had ample notice that she would not be permitted to return to work until she complied with the treatment recommendations and was deemed fit for duty by the County's psychologist. Further, Gallegos maintain, after receipt of Dr. Hewitt's report, that additional treatment was required. Accordingly, the appellant is not entitled to relief as a result of the County's delay in initiating disciplinary charges.

Nevertheless, the Board finds that the County cannot maintain the status quo indefinitely, and it clearly is not in the public interest to return the appellant to her public safety position where there are legitimate concerns regarding her fitness for duty and need for

further psychological treatment. Therefore, within 80 days of receipt of this decision, the appellant should submit documentation to the County demonstrating what, if any, treatment she has received in accordance with the recommendations of Gallegos and Dr. Hewitt. In the event that the appellant is unable to demonstrate compliance with the treatment recommendations and the County's mandate that she undergo the requisite treatment, the County must pursue disciplinary charges, such as inability to perform duties or unfitness for duty, in order to further preclude her from returning to work, and follow the major disciplinary process set forth in Merit System law and regulations. If, however, the appellant is able to demonstrate that she is actively and gays in the treatment recommended by Gallegos, her medical leave of absence may be continued, if the County so chooses, until such time as the County's psychologist deems her fit to return to duty. See e.g., In the Matter of Karol Hennessey (MSP decided February 23, 2005).

ORDER

Therefore, it is ordered that this appeal be denied.

It is further ordered that the appellant provide medical documentation to the County within 30 days of receipt of this decision demonstrating what, if any, treatment she has undergone.

DECISION RENDERED BY THE MERIT SYSTEM BOARD ON THE 27th DAY OF JULY, 2005.

No. 10-709

Supreme Court, U.S.
FILED
DEC 16 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JANE E. BENTLEY,

Petitioner,

vs.

ATLANTIC COUNTY, NEW JERSEY; THE OFFICE OF THE SHERIFF OF ATLANTIC COUNTY, NEW JERSEY; JAMES MCGETTIGAN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF OF ATLANTIC COUNTY; JOSEPH CONNELLY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

TIMOTHY M. CRAMMER
CRAMMER, BISHOP & O'BRIEN, P.C.
508 New Jersey Avenue, B-3
Absecon, New Jersey 08201
Telephone: (609) 677-6996
Facsimile: (609) 677-6926
E-Mail: tcrammer@crammer-bishop.com

Attorneys for the Respondents

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STATEMENT OF THE CASE

On October 28, 2003, Atlantic County New Jersey Sheriff's Officer Jane E. Bentley (Bentley) walked into a room where other Sheriff's officers were processing individuals who had been arrested, and declared that she wanted to "see the nine officers who beat up that poor woman." The incident was reported to Under Sheriff Joseph Connelly (Connelly), who was concerned by what he perceived to be Bentley's allegation of criminal conduct by other officers. Connelly met with Bentley on November 5, 2003 to discuss the matter.

Bentley behaved emotionally and irrationally during the meeting. When asked about the October 28 incident, she told Connelly "I'm tired of all these people persecuting me for things, and I might not remember what I said." Connelly suspected that Bentley might be psychologically unfit for duty. He directed her to prepare a written report of the October 28 incident. Bentley told another officer that she did recall the incident, but her report nevertheless stated that she did not recall the incident. After receiving Bentley's report, Connelly suspended her, not as a form of discipline but because he believed that she was psychologically unfit for duty. Bentley was then formally suspended from duty, with pay, pending a November 12, 2003 examination by a psychologist. Bentley was not told at the time that her suspension was not disciplinary.

Bentley's union retained Steven Cohen, Esquire (Cohen) to represent her. Insisting that the suspension was disciplinary, Bentley filed a grievance, the first step in her collective bargaining agreement for contesting disciplinary action. Atlantic County Counsel James Ferguson (Ferguson) responded to the grievance by asserting that the suspension was not disciplinary because Bentley was not being punished. Ferguson advised Cohen by the end of January 2004 that Bentley's suspension was not considered disciplinary.

The psychologist retained by the County found that Bentley was psychologically unfit for duty. He recommended a neuropsychological evaluation and six months of psychotherapy. Bentley was advised of those findings, advised that she would be classified as unfit for duty and not carried on the payroll as of December 2, 2003, and advised that she could not return to active duty until she completed the testing and treatment recommended by the psychologist.

Bentley continued to contest the suspension as if it was a disciplinary action. She obtained a report by her own psychologist, who found that she was fit for duty, and, on December 18, 2003, she sought binding arbitration of the grievance through the New Jersey Public Employment Relations Commission (PERC). Ferguson filed a petition to restrain arbitration on the ground that non-disciplinary action cannot be arbitrated.

PERC ruled that Bentley could not arbitrate the suspension. PERC noted that Bentley could appeal the suspension directly to the New Jersey Merit System Board, an independent entity in New Jersey's Department of Personnel charged with interpreting New Jersey's Civil Service Act and reviewing employment actions. *N.J.S.A.* 11A:2-6.[1]

On November 12, 2004, Bentley appealed the suspension to the Merit System Board. She argued that the suspension was disciplinary, that she was never served with a notice of disciplinary action, and that a departmental hearing was not conducted as required by civil service regulations governing disciplinary actions. Bentley and the County submitted extensive briefs and documentation to the Merit System Board.

While the appeal to the Merit System Board was still pending, Bentley filed this action in the United States District Court for the District of New Jersey, alleging race and gender discrimination in violation of federal and state law, a violation of her procedural due process rights under the United States Constitution, and a violation of her right to equal protection of the law under the United States Constitution. On July 27, 2005, the Merit System Board issued a written decision. The Board ruled that the suspension was both justified and not disciplinary. (Petition for certiorari, at 43a – 48a)

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1 Atlantic County is a New Jersey civil service jurisdiction.

Bentley never appealed the Merit System Board's decision to the Appllate Division of New Jersey's Superior Court as permitted by New Jersey Court Rule 2:2-3(a)(2), and she never completed the recommended psychological treatment. Accordingly, she remained suspended without pay while this action proceeded. The District Court ultimately dismissed all of Bentley's claims except the procedural due process claim.

The case was tried twice. Prior to the first trial, the District Court ruled that the respondents violated Bentley's due process rights by failing to notify her or her attorney, at the time when she was suspended, that the suspension was not disciplinary. The District Court reasoned that without such notice Bentley would not have known that appealing to the Merit System Board was the correct avenue for obtaining review of the suspension. As a result, Bentley was denied her due process right to a prompt post-deprivation hearing before the Board. (Petition for certiorari, at 13a – 14a)

Bentley also argued that the Merit System Board's procedures did not provide her with due process. The District Court rejected the argument and held that the Merit System Board's procedures comported with constitutional due process. (Petition for certiorari, at 10a – 13a).

The District Court also held that an earlier appeal to the Merit System Board would not have changed the Board's ultimate decision. (Petition for

certiorari, at 14a – 16a) Accordingly, the District Court ruled that Bentley was not entitled to compensatory damages caused by the suspension itself because even if the due process violation had not occurred and Bentley had filed an earlier appeal to the Merit System Board, the Board would have reached the same decision regarding the merits of the suspension. As the District Court put it: "If Plaintiff had appealed to the Merit Board a year earlier, the result would be exactly the same; it simply would have occurred earlier." (Petition for certiorari, at 16a)

The only remaining issue to be tried was damages. The District Court allowed Bentley the opportunity to prove that she experienced emotional distress as a result of the constituional violation; that is, emotional distress caused by the delay in obtaining review of the suspension by the Merit System Board. (Petition for certiorari, at 16a – 17a) At a pre-trial conference on September 12, 2008, the District Court ruled that Bentley could recover damages only for emotional distress that was severe.

The first trial resulted in a verdict in favor of Bentley for $92,000. The District Court granted the respondents' motion for a new trial, in part because Bentley's counsel suggested, through questioning of witnesses and in closing argument, that Bentley could recover damages for emotional distress attributable to the suspension itself, as opposed to emotional distress caused by the delay in obtaining review by the Merit System Board.

At the start of the second trial, the District Court ruled, consistent with its prior decisions, that any delay in appealing to the Merit System Board caused by the failure to advise Bentley that her suspension was not disciplinary necessarily ended when Bentley's attorney was in fact advised that the suspension was not disciplinary. The parties disagreed when that occurred, and the jury was instructed to preliminarily determine when Bentley's attorney was advised that the suspension was not disciplinary. That factual determination would define the length of the delay in obtaining post-deprivation review for purposes of awarding damages for severe emotional distress, if any, caused by the delay.

The jury for the second trial found that Bentley's attorney was advised no later than January of 2004 that the suspension was not disciplinary. After a brief recess before the trial proceeded on damages, Bentley's attorney advised the District Court that he was withdrawing the claim for emotional distress damages on the ground that he did not believe there was a reasonable likelihood of prevailing on the claim in light of the jury's preliminary verdict. The District Court entered judgment in favor of Bentley for $1.00 in nominal damages. Bentley appealed to the Third Circuit.

The Third Circuit affirmed the judgments and orders of the District Court. Bentley's petitions for rehearing and for rehearing *en banc* were denied.

ARGUMENT

A.

The Merit System Board's Review Afforded The Petitioner Due Process, And An Earlier Appeal Would Not Have Altered The Result

The petitioner seeks review of three issues presented to the District Court and to the Third Circuit: (1) whether the Merit System Board would have reached the same decision if Bentley had been given the "opportunity to explain her position"; (2) whether the Board's finding that the suspension was justified foreclosed evidence of Bentley's economic losses resulting from "the due process violation"; and, (3) whether Bentley had to prove that she experienced severe emotional distress caused by "the due process violation" in order to recover damages for emotional distress. (Petition for certiorari, at 11 – 12)

The first two issues raised by the petitioner require, and are resolved by, the answer to the same basic question: Did the Merit System Board's review of the suspension satisfy due process?

The petitioner's statement of the first issue assumes that the Board's review did not provide Bentley with due process. The District Court would have been required to determine whether a review that satisfied due process would have resulted in a

decision that the suspension was improper only if the Board's review did not satisfy due process. If the Board's review did satisfy due process, it's finding that the suspension was justified was dispositive of that state law issue, and Bentley was not entitled to damages caused by the suspension itself. [2]

A person seeking damages resulting from procedural deficiencies in connection with a justified deprivation of rights cannot recover damages caused by the deprivation; damages may be awarded only for actual injuries, such as emotional distress, caused solely by the procedural violation. *See Carey v. Piphus*, 435 U.S. 247, 260 (1978).[3]

The petitioner's statement of the second issue also assumes that the Board's review did not provide her with due process. Again, the District Court would have needed to decide whether a constitutionally

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2 In that regard, this case is analogous to federal *habeas corpus* cases, where it is "axiomatic that federal ... courts do not sit to re-examine state court determinations of state law." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Federal courts do not have supervisory authority over state proceedings, and may intervene only to correct wrongs of constitutional dimension, not errors in determinations of state law or procedures. *Id.*; *see also Smith v. Phillips*, 455 U.S. 209, 221 (1982)

3 If a procedurally deficient but justified deprivation did not cause actual damage, a plaintiff may still recover nominal damages of $1.00 for the procedural violation. *Carey*, 435 U.S. at 267. That is what occurred in this case.

adequate review would have resulted in a finding that the suspension was improper only if the "due process violation" at issue was a constitutionally deficient review by the Merit System Board. Only in that event would the Court have had to decide what economic damages Bentley sustained due to the suspension itself. If the Board's review satisfied due process, its finding that the suspension was justified barred recovery of economic damages caused by the suspension itself.

The District Court ruled that the petitioner was not entitled to compensatory damages resulting from the suspension because the Merit System Board found that the suspension was justified. However, the Court held that the petitioner was entitled to damages for any emotional distress caused by any delay in appealing to the Board that was occasioned by the respondent' failure to advise the petitioner that her suspension was not disciplinary.

Did the Merit System Board's review of the suspension satisfy due process? Clearly it did. This Court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). However, it is well settled that due process does not require formal testimonial hearings that include direct and cross-examination of witnesses. *See Bd. of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978); *Goss v. Lopez*, 419 U.S. 565, 583-584 (1975).

The nature of the hearing required by due process depends on a balancing of three interests: (1) the private interest at stake, (2) the risk of error in the procedure used compared with the degree of improved accuracy that additional procedures would provide, and (3) the government's interest. *Mathews*, 424 U.S. at 334-335; *Wilson v. MVM*, 475 F.3d 166, 178 (3d Cir. 2007).

The District Court addressed each of the *Mathews* factors and found, on balance, that the Merit System Board's review of the petitioner's suspension provided her with due process. (Petition for certiorari, at 10a – 13a) The petitioner was permitted to and did submit briefs and other documentation to the Board, including the report of her psychologist, and to present argument with respect to the merits of her suspension. As the District Court stated, a more formal hearing would not have significantly enhanced the accuracy of the Board's determination that the respondents' decision to temporarily suspend an employee believed to be psychologically unfit for duty was justified.

Under these circumstances, the District Court correctly determined that the Merit System Board's review provided the petitioner with the opportunity to be heard in a meaningful, albeit untimely manner, and that the petitioner availed herself of that opportunity. (Petition for certiorari, at 13a). The Third Circuit agreed.

The petitioner has, throughout this litigation, collaterally attacked the merits of the Merit System Board's decision in an attempt to recover economic damages caused by the suspension. First, she argued that constitutional due process required a departmental hearing regarding the suspension pursuant to state civil service procedures for reviewing disciplinary actions. She contended that a hearing officer might have ruled that her suspension was not justified. The District Court properly rejected that argument on the ground that federal due process rights are not defined by state law procedures. (petition for certiorari, at 8a – 9a) [4]

Second, the petitioner argued, as she does now, that the Merit System Board's review was itself constitutionally deficient because the Board did not permit oral argument or the presentation of in-person testimony by witnesses. As noted above, the District Court properly rejected that argument.

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[4] Even if a departmental hearing was conducted pursuant to New Jersey's civil service procedures for reviewing disciplinary actions, the respondents would have argued that the suspension was not disciplinary and not subject to review by the department hearing officer. If the department hearing officer disagreed and determined that the suspension was justified, the respondents would have rejected the hearing officer's finding, leaving Bentley to appeal to the Merit System Board. *See N.J.S.A.* 11A:2-14. Thus, in any event, Bentley would have ended up at the Merit System Board and obtained the same result.

The petitioner now asserts, for the first time, that the District Court should have allowed the jury to decide whether the Merit System Board's review satisfied due process, and, if the jury found that it did not, whether a review that did (presumably a review that included a formal testimonial hearing with examination of witnesses) would have resulted in a decision that the suspension was improper. (Petition for certiorari, at 13 – 15)

First, we specifically object to the petitioner's attempt to raise this issue for the first time in her petition for certiorari. This Court ordinarily will not decide questions not raised or litigated in the lower courts. *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987), citing *California v. Taylor*, 353 U.S. 553, 556 n2 (1957). While the petitioner did argue below that the Merit System Board's review did not in itself afford the petitioner due process, the petitioner did not argue to the District Court or to the Third Circuit that a jury, not the court, should have made that determination, and neither the District Court nor the Third Circuit discussed or decided that issue.

Without waiving that objection, we submit that the cases cited by the petitioner in support of her argument, *Stein v. The Bd. of the City of New York*, 792 F.2d 13 (2d Cir. 1986), *Brewer v. Chauvin*, 938 F.2d 860 (8th Cir. 1991), and *Hill v. City of Pontotoc*, 993 F.2d 422 (5th Cir. 1993) are inapposite. In *Brewer*, the plaintiff was not provided with any hearing, so the District Court was required to determine whether the plaintiff would have been

fired even if provided with a constitutionally adequate hearing. In *Stein*, a fact issue whether the plaintiffs had been provided with adequate *notice* of a hearing was submitted to the jury. In *Hill*, a jury was asked to and did decide whether the plaintiff was afforded due process in connection with a hearing where he was not advised of certain charges that played a role in the decision to fire him. The jury found that the plaintiff was not afforded due process, and that he would not have been fired if afforded a constitutionally adequate hearing. The Fifth Circuit affirmed without discussing why a jury, as opposed to the District Court, decided the issue of the adequacy of the hearing.

The Courts of Appeal in the cases cited by the petitioner did not hold that every challenge to the constitutionality of a hearing must be submitted to a jury. In *Hill*, where the question was submitted to a jury, the Fifth Circuit did not discuss whether submission to the jury was required because there were fact issues that a jury had to decide. Here, there were no jury questions relevant to the issue of the constitutionality of the Merit System Board's review, and that issue was appropriately decided by the District Court. *See Midnight Sessions, Ltd. v. Philadelphia*, 945 F.2d 667, 682 (3d Cir. 1991), *cert. denied*, 503 U.S. 984 (1992), abrogated on other grounds, *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 400 (3d Cir. 2003).

The petitioner has failed to present any convincing argument that the Merit System Board's review was constitutionally inadequate, or that the issue of the constitutionality of the Board's review should have been decided by the jury.

B.

It Was Appropriate To Require The Petitioner To Prove That Her Emotional Distress Was Severe In Order To Recover Damages For Any Actual Injury Caused By The Due Process Violation

The petitioner argues that the District Court misinterpreted federal law by requiring proof that the petitioner experienced severe emotional distress in order to recover damages for any actual injury caused by the due process violation. We submit that the District Court's ruling in that regard was neither error nor inconsistent with this Court's opinion in *Carey v. Piphus*, 435 U.S. 247, 260 (1978).

Carey involved claims for damages by students suspended from school without a hearing that afforded them due process. The Court concluded that 42 U.S.C. § 1983 was intended to create a species of tort liability in favor of persons deprived of rights, privileges, or immunities secured to them by the Constitution. *Id.* at 253. The Court noted that the

common law of torts has developed rules to implement the principle that a person should be compensated fairly in a § 1983 action for injuries caused by a violation of his legal rights, and that "these rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point" for determining how to compensate actual injuries caused by violations of due process rights. *Id.* at 257-258. The Court noted that 42 U.S.C. § 1988 authorizes courts to look to the common law of the States where this is "necessary to furnish suitable remedies." *Id.* at 257 n13.

The District Court properly applied the principles expressed in *Carey* by looking to the common law of New Jersey to determine whether the petitioner actually experienced emotional distress caused by the constitutional violation at issue in the case – the delay in obtaining post-deprivation review by the Merit System Board.

Recovery of damages for emotional distress in New Jersey, as in many states, requires evidence of severe emotional distress. *Decker v. Princeton Packet, Inc.*, 116 N.J. 418, 429-430 (1989)(negligent infliction of emotional distress); *Buckley v. Trenton Saving Fund Soc'y*, 111 *N.J.* 355, 366-367 (1988)(intentional infliction of emotional distress). The severity requirement addresses concerns about the validity of claimed emotional distress by enhancing the likelihood that the claim is not spurious. *Decker*, 116 N.J. at 429-430.

This Court has expressed the same concerns about the genuineness of emotional distress claims, which, due to their inherently subjective nature, can be fraught with vagueness and speculation, or even be trivial or fictitious. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 545 (1994). Indeed, the Court recognized in *Carey* that it is not reasonable to assume that procedural deficiencies are inherently likely to cause emotional distress, and that, as in this case, *a person may not even know that procedures were deficient* until enlisting the aid of counsel to challenge a perceived substantive deprivation. *Carey*, 435 U.S. at 263.[5]

By requiring the petitioner to demonstrate that she experienced severe emotional distress, the District Court did not require any particular type or quantum of evidence to satisfy that burden. We agree with the petitioner that federal courts have not uniformly imposed state law requirements regarding the type or quantum of evidence necessary to prove emotional distress in § 1983 actions. *See Price v. City*

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[5] Courts at times apply a more lenient standard where the conduct involved is particularly egregious or abhorrent, such that it can reasonably be expected to cause genuine emotional distress. *United States v. Balistrieri*, 981 F.2d 916, 932 (7th Cir.1992)(racial discrimination); *Tarr v. Ciasulli*, 181 N.J. 70, 81-82 (2004)(extraordinarily demeaning sexual harassment). This is not such a case. *See Alston v. King*, 231 F.3d 383, 388 (7th Cir. 2000)(the failure to provide a pre-termination hearing is not inherently degrading conduct that portends emotional distress).

of Charlotte, 93 F.3d 1241 (4th Cir. 1996)(testimony of plaintiff alone, without corroborating evidence, may be sufficient to justify an award of damages for emotional distress).

Because the District Court did not require the petitioner to prove severe emotional distress by presenting evidence other than her own testimony, the petitioner's failure to proceed with the damages part of the second trial bars her from now asserting that the District Court erred by imposing the severity requirement. The petitioner may well have prevailed if her testimony, together with any other evidence that she presented, convinced the jury that she did experience severe emotional distress as a result of the delay in obtaining post-deprivation review by the Merit System Board.[6]

Even if the petitioner had not waived her right to claim that the District Court erred by imposing a severity requirement for proving emotional distress, it is clear that the District Court correctly looked to New Jersey law as a starting point in defining the elements of the petitioner's federal law claim for emotional distress resulting from the denial of her right to due process. The severity requirement effectively addresses state and federal court concerns regarding the genuineness of emotional distress,

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6 The petitioner refused to proceed with the damages portion of the second trial because the jury's preliminary finding limited the time period during which emotional distress was compensable, and not because of the requirement that she prove severe emotional distress.

without requiring any particular type or quantum of supporting evidence.

VI. CONCLUSION

The Court should deny the petition for certiorari.

Respectfully submitted,

Timothy M. Crammer, Esquire
Counsel of Record

Crammer, Bishop & O,Brien, P.C.
508 New Jersey Avenue, B-3
Absecon, NJ 08201
tcrammer@crammer-bishop.com
609-677-6996